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No. 99-1379

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Division of Labor Standards Enforcement, Department of Industrial Relations, State of California ("DLSE"), headed by its Chief, the California Labor Commissioner, is the agency charged with the enforcement of California's wage and hour laws, as well as other state labor laws enacted for the protection of workers. The agency administers an elaborate state-wide administrative system designed to enable workers to promptly and efficiently vindicate their rights to the correct and full payment of minimum, overtime, and contract wages owed to them under California's labor laws. The machinery set up to administer this system consists of district offices throughout the state that intake, process, adjudicate, and enforce wage claims, bureau offices throughout the state comprised of field deputies that investigate compliance with the wage and hour laws, a staff of state-wide senior administrative officers that oversees and supervises the operations of the DLSE, and a state-wide staff of attorneys charged with providing the legal expertise and resources needed to implement, apply, administer, and enforce California's labor laws.

In the arena of wage enforcement, the DLSE administrative system is an effective tool for insuring labor law compliance and expeditiously recovering and collecting wages. California law guarantees every worker access to that system by denying legal effect to an arbitration

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[1] Both parties have consented to the filing of this brief, and letters of consent have been filed with the Court. No counsel for a party had any role whatever in the authoring of this brief, and other than the named amicus and its counsel no person has made any monetary contribution to the preparation or submission of this brief.

clause that purports to waive a worker's right to enforce a wage claim in an administrative or judicial forum. In light of the ever expanding proliferation of employment agreements containing arbitration clauses, if the Federal Arbitration Act is applied to the states it will nullify access to the DLSE and inevitably result in the dismantling of an administrative scheme which is far superior to arbitration in securing and enforcing a wage earner's rights to proper compensation under California law. Since the DLSE believes that Congress never intended such a result, it has a substantial interest in expressing its views on this subject.

INTRODUCTION

As a condition of employment, all employees of Petitioner Circuit City Stores, Inc. ("Circuit City") must agree in writing to arbitrate virtually any employment-related claim they may have against Circuit City. The underlying issue presented by this case is not whether the arbitration clause contained in the employment agreement of Respondent Saint Clair Adams ("Adams") is valid and enforceable, but rather whether the determination of the question of the clause's validity and enforceability is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., or by state law.

Despite explicit statutory language excluding "contracts of employment" from the reach of the Congressional commerce power exercised in enacting the FAA, 9 U.S.C. § 1, and despite the well recognized historical role of the states as the protectors of workers rights and arbiters of the remedies (judicial, administrative, or arbitral) best suited to enforcing those rights, Circuit City and its *amici* argue that the FAA wrests this traditional protective power from the states and turns it over to employers.

The position fails to recognize that in the arena of workers' rights the FAA was not intended to alter the balance of power between the federal government and the states, and more particularly, that the FAA's exclusion for "contracts of employment" was meant to preserve the central role of the states as the primary guardians of the rights and protections afforded to workers.

SUMMARY OF ARGUMENT

When Congress enacted the FAA in 1925, it specifically intended to exclude all contracts of employment from the reach of the FAA. To accomplish this objective, Congress inserted an exclusionary clause into the FAA which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The clause contains the jurisdictional language "engaged in interstate commerce" and those words express the full extent of Congress's 1925 commerce power over "contracts of employment." Congress appended that exclusionary clause to the definition of "commerce" in § 1 of the FAA in order to withdraw all of the commerce power it possessed over "contracts of employment" from the scope of the commerce power it was exercising under the FAA.

The effect to be accorded the words "engaged in interstate commerce" when used in an exclusionary clause is different from the contemporary effect accorded to those words when used in an inclusionary clause. In an exclusionary clause that predates the 1937 expansion of the commerce power, the words "engaged in interstate commerce" are construed broadly rather than narrowly

because they operate to limit rather than expand compressional power. Since the modern narrow meaning of "engaged in interstate commerce" is likewise concerned with avoiding an improper expansion of congressional power, that narrow meaning cannot foreclose an inquiry into whether the 1925 exclusionary language was intended to be read broadly so as to exclude all "contracts of employment" from the reach of the FAA. Petitioner's argument that such an inquiry is precluded is therefore unsound.

The text, structure, and context of the FAA § 1 exclusion, as well as its legislative history and the evident specific intent of Congress, show that the language of the exclusion was selected by Congress to implement the Congressional objective of excluding all contracts of employment from the scope of the FAA and that consequently it should be given that effect. Contrary to Petitioner's arguments, all of the language used by Congress was designed to serve the exclusionary purpose, and none of it was superfluous. The jurisdictional words "engaged in interstate commerce" were used by Congress to unequivocally express the full extent of Congress's 1925 commerce power over contracts of employment, and the rule of ejusdem generis did not apply and could not be used to circumscribe their reach. Since the full commerce power of Congress over contracts of employment was placed within the exclusion, that entire portion of Congress's commerce power was excluded from the scope of the commerce power exercised under the FAA. This conclusion is unequivocally supported by the legislative history. Since the FAA § 1 exclusion embodies a distinct and important policy aimed at promoting flexibility in the area of contracts of employment, that policy

should be implemented to ensure that the states will not be divested of their traditional role as the principal protectors of the rights of workers.

ARGUMENT

I. THE TEXT OF THE FAA § 1 EXCLUSION EXPRESSES CONGRESS'S INTENT TO WITHDRAW FROM THE SCOPE OF THE COMMERCE POWER EXERCISED TO ENACT THE FAA ALL "CONTRACTS OF EMPLOYMENT" WITHIN THE REACH OF THE COMMERCE CLAUSE OF THE CONSTITUTION.

Section 2 of the FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable. . . . "

> "Section 2 makes 'valid, irrevocable, and enforceable' only two types of contracts: those relating to a maritime transaction and those involving commerce."

Bernhardt v. Polygraphic Co., 350 U.S. 198, 200 (1956). As this Court emphasized in *Bernhardt*, the Senate Committee Report on the FAA bill, " . . . S. Rep. No. 536, 68th Cong., 1st Sess. p. 2, states that § 1 defines the contracts to which 'the bill will be applicable.' " *Id.* at 201. Section 1 of the FAA defines "[m]aritime transactions" and "commerce," and then concludes with an exclusionary clause specifically addressed "to contracts of employment."

In *Southland Corporation v. Keating*, 465 U.S. 1 (1984), this Court took cognizance of the § 1 exclusion, and in doing so framed the basic issue under consideration in this case.

> "We note that in defining 'commerce' Congress declared that 'nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1."

Southland Corporation, 465 U.S. at 11 n.5. To put the matter more directly, the question presented is: What "contracts of employment" did Congress withdraw from the "commerce" power it exercised when in enacted the FAA? Did it withdraw all contracts of employment, or did it withdraw only some?

The answer to that question lies in the text, structure, and context of the language used by Congress. When Congress used the words "of seamen, railroad employees, or any other class of workers engaged in interstate commerce" to qualify the term "contracts of employment," it used language intended to convey its full constitutional commerce power over contracts of employment, and when it then inserted that language into an exclusionary clause, as opposed to an inclusionary one, it did so in order to withdraw this entire portion of its power from the actual power exercised in enacting the FAA. That withdrawal specifically placed all "contracts of employment" outside the purview of the FAA, and permanently foreclosed the use of § 2 of the FAA to enforce an arbitration provision contained in any such contact. "Sections 1, 2, and 3 are integral parts of a whole." *Bernhardt*, 350 U.S. at 201.[2]

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[2] Once "contracts of employment" are excluded from the definition of "commerce" under § 1 of the FAA, such contracts cannot come within the purview of § 2 even if the scope of the commerce power under the latter section expands with the passage of time. Thus, even though the term "contract evidencing a transaction involving *commerce*" may expand to reach certain local transactions which merely affect interstate commerce, *see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), that expansion can never extend to "contracts of employment" because by definition such contracts are no longer included within the meaning of "*commerce*" under § 1.

The position that only some employment contracts are excluded must necessarily rest on the premise that the language of the § 1 exclusion manifests something less than Congress's entire 1925 commerce power over contracts of employment; in that case it is possible to argue that not all classes of workers were excluded and that piecemeal application of the "engaged in commerce" language to determine which classes were and which were not excluded is appropriate. That position, however, is refuted by the statute's text, structure, and context, by the specific Congressional intent and the legislative history of the exclusion, and by the policies underlying the exclusion's purpose. Congress utilized language calculated to effectuate a complete exclusion of "contracts of employment" from the reach of the FAA, and thereby entirely obviated the possibility and pr[illegible]ety of piecemeal exclusion determinations.

A. Congress Inserted Jurisdictional "Commerce Power" Language Into The FAA § 1 Exclusion For The Purpose Of Spelling Out That Under The FAA It Did Not Intend To Exercise Any Of The Commerce Power It Possessed Over "Contracts Of Employment."

At the outset, it is important to recognize that Congress used jurisdictional "commerce power" language in delineating the FAA § 1 exclusion. In particular, the court invoked the phrase "engaged in . . . interstate commerce."

9 U.S.C. § 1. This Court's commerce power jurisprudence shows that the words "engaged in commerce" are invariably incorporated into an inclusionary clause in a statute to indicate how much commerce power Congress intends to exercise.

> "The question . . . is how far Congress intended to extend its mandate under the Clayton [Act] [15 U.S.C. §§ 14 and 18] and Robinson-Patman Act [ ] [15 U.S.C. § 13(a)]. The answer depends on the statutory language read in light of its purposes and legislative history."

Citation omitted. *Gulf Oil Corp. v. Capp Paving Co.*, 419 U.S. 186, 197 (1974) ("in commerce"). "It is clear that the purpose of the [Fair Labor Standards] Act [29 U.S.C. §§ 206 and 207] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.* 317 U.S. 564, 567 (1943) ("engaged in commerce"). "Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged in is part of interstate commerce." *Ill. Cent. R.R. Co. v. Behrens*, 233 U.S. 473, 478 (1914) (Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65: "employed in [the interstate] commerce" of the carrier while the carrier is "engaging in [interstate] commerce").

When, as here, the commerce power jurisdictional language is placed in an exclusionary clause, however, it has an entirely different signification. Instead of indicating how much power Congress intends to use, the language now signals just the opposite, namely how much power Congress intends *not to use*. In other words, the inverted context into which the jurdisctional language is transposed radically alters its customary import and operative effect, and requires a careful reconsideration of

the guidelines normally employed to determine what effect the jurisdictional language should be given.

Historically, two considerations have dictated a narrow reading of the words "engaged in commerce" when used in an inclusionary clause defining the scope of the power exercised by Congress. One is the concern for preserving the structure of our federal system of government and avoiding incursions on the powers of the states unless such were plainly intended by Congress.

> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly . . . [B]earing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 [Federal Trade Commission Act, § 5(a), 15 U.S.C. § 45(a).] radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

FTC v. Bunte Bros., Inc., 312 U.S. 349, 351 (1941). Citations omitted.

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. . . . Congress did not exercise in this Act [Fair Labor Standards Act] the full scope of the commerce power."

Walling v. Jacksonville Paper Co., 317 U.S. 564, 570 (1943). Citations omitted. The other consideration, applicable to the era preceding the expansion of the commerce power, is expressed in the court's practice of giving a statute a construction narrow enough to avoid constitutional infirmity. Thus, in the case of *Baltimore & Ohio R.R. Co. v. ICC*,

221 U.S. 612 (1911), involving the construction of "An Act to Promote the Safety of Employees . . . ," Act of March 4, 1907, 34 Stat. 1415, the court concluded that although the words "employees, engaged in the transportation of persons or property by railroad in [interstate commerce]" extended to the intrastate activities of the employees, they did so only insofar as the intrastate activities were indivisible from the interstate activities, which activities as a whole, the court found, were within the reach of the commerce power. *Baltimore v. Ohio R.R. Co. v. ICC*, 221 U.S. at 616-619.

Neither of the foregoing considerations applies, however, when the words "engaged in commerce" are used in an exclusionary clause. In that context, a narrow reading of the words is not required to avoid an incursion on state power; on the contrary, when the words "engaged in commerce" are embedded in an exclusionary clause, it is a broad reading of those words that will limit congressional power, further the interests of the federal system, and avoid an unintended and unwarranted intrusion upon the authority of the states. And that, obviously, is because a broad reading confirms the substantial dimensions of the power Congress has chosen not to exercise but to leave to the states. Likewise, if one adopts the appropriate 1925 perspective, it is quite evident that a narrow reading of the language would not have been required to salvage the statute's constitutionality; rather, as before, it is a broad reading of the "engaged in commerce" language that would have confirmed a constricted exercise of power by the Congress and served to buttress the constitutional validity of the statute.

In sum, as the foregoing analysis makes clear, the very considerations which invite a narrow reading of "engaged in commerce" when used in an inclusionary

clause dictate a broad reading of those words when they appear in an exclusionary clause. It is with this backdrop in mind, that one must assess how much commerce power Congress chose not to exercise when it framed the FAA § 1 exclusion. Absent compelling contrary indications, that backdrop should strongly militate against reaching the conclusion either that Congress did not recite its entire commerce power over contracts of employment in the exclusionary clause or that, if it did, Congress intended that recital to be fixed in time and not govern any future expansion of the commerce power. The 1925 Congress should not be lightly understood to have permanently parted with all or virtually all of its 1925 commerce power over contracts of employment with the intent that some unrealized and never exerted power over contracts of employment, that might materialize sometime in the future, should be applied to displace and override the powers that would otherwise have been preserved to the states. *Cf. FTC v. Bunte Bros., Inc.*, 312 U.S. at 354:

> "The construction of § 5 urged by the Commission would thus give a federal agency pervasive control over the myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far reaching import as is involved here, ought to await a clearer mandate from Congress."

At this point, it is evident that the foregoing analysis serves to completely refute the argument of Petitioner and its *amici* that because in contemporary commerce power jurisprudence the words "engaged in commerce" have a fixed meaning that is narrower and more restrictive than the words "involving commerce" or "affecting commerce," that narrower meaning should be imported

into the "engaged in commerce" language used in the FAA § 1 exclusion. Obviously, that argument is fundamentally flawed: first, it completely ignores the significance of the fact that the words in § 1 of the FAA appear in an exclusionary clause as opposed to an inclusionary clause; second, it fails to recognize the fact that in 1925 (prior to the revolutionary expansion of the commerce power), Congress could readily have used both the words "involving commerce" and the words "engaged in commerce" to delineate its full commerce power under the Constitution, the former in an inclusionary clause reaching all "contracts" other than those excluded from the definition of "commerce" and the latter in an exclusionary clause precisely excluding from that definition all "contracts of employment" within the reach of the commerce power; and third, it is designed to avoid addressing the question of whether the "engaged in commerce" language was intended to completely withdraw all contracts of employment from the scope of the commerce power exercised under the FAA. The argument of Petitioner simply seeks to leap past the threshold question of whether § 1 effects a complete withdrawal of commerce power over contracts of employment, and to treat the issue as one confined solely to determining which particular classes of workers were intended to be excluded from the FAA by the words "engaged in interstate commerce."

Plainly, Petitioner cannot evade the critical threshhold issue of total exclusion through the simple expedient of focusing its attention on an issue which does not even arise if it is determined Congress intended to exclude all "contracts of employment" and not just specific classes of employees. In other words, if all contracts of employment

are excluded from the reach of the FAA, then the question of which classes of workers fall within the exclusion of § 1 is a non sequitur – since all employment contracts are outside the purview of the FAA there are no class-specific exclusion or inclusion determinations to be made. To proceed, as Petitioner has done, directly to an issue which may never arise, is to beg the very question to be answered.[3]

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[3] It is, of course, possible to focus on the question of which classes of workers are excluded and to come to the conclusion that all classes of workers – and therefore all contracts of employment – are excluded. This is the approach followed by the Ninth Circuit Court of Appeals in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999). Given that "involving commerce" was set out in an inclusionary clause while "engaged in interstate commerce" was contained in an exclusionary clause, and that in 1925 Congress did not differentiate between "involving" and "engaged in" for commerce power purposes, it is entirely permissible to treat both terms as coextensive for purposes of determining what contracts are reached by the "commerce" power exercised under the FAA; such an approach is merely an alternative implementation of Congress's specific intent that the commerce power, even if expanded, not encompass contracts of employment. Nevertheless, the more accurate construction of the statutory text, as previously pointed out, is that pursuant to the § 1 exclusion all contracts of employment were withdrawn from the § 1 definition of "commerce."

B. The Text, Structure, And Context Of The FAA § 1 Exclusion Demonstrate That the Exclusion Broadly Describes Congress's Entire 1925 Commerce Power Over "Contracts Of Employment" For The Purpose Of Excising That Power From The Power Asserted Over All Other "Contracts" In Enacting The FAA.

In delineating the exclusion for "contracts of employment" in § 1 of the FAA, Congress chose to use the following language: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. It has been suggested by some that if Congress had actually meant to exclude all contracts of employment from the FAA, it would have used either the phrase "nothing herein contained shall apply to contracts of employment" or the phrase "nothing herein contained shall apply to contracts of employment of any class of workers engaged in interstate commerce." The contention is that either of these two phrases would have been more appropriate for effecting a complete exclusion, and that consequently Congress must have intended to exclude something less than all contracts of employment. The contention is misplaced. As will appear from the discussion which follows, Congress plainly selected the more comprehensive exclusionary language it used because such language was best tailored to accomplish Congress's objective of excluding all "contracts of employment" from the scope of the commerce power exercised under the FAA.

1. In *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908) (the first employer liability case), the Court struck down the initial version of the statute eventually reenacted as the FELA; the Court declared the statute unconstitutional on the ground that its regulatory reach was not limited tc

those railroad employees whose activities were actually linked to interstate commerce. In the aftermath of *Howard*, at least with respect to the regulation of employees, Congress was keenly aware of the need for precision in delineating the scope of the jurisdictional authority it intended to exercise under the commerce power. It follows that in enacting the FAA, Congress chose the statute's jurisdictional language carefully.

The emanations from *Howard* must clearly have dictated Congress's decision not to use just the words "nothing herein contained shall apply to contracts of employment" in the FAA § 1 exclusion. Unaccompanied by appropriate jurisdictional language, those words might easily have been construed by the courts as merely providing assurance that the FAA did not extend to contracts of employment outside the reach of the commerce power. Such a reading of the words would have completely frustrated the accomplishment of Congress's very specific intent to also exclude those contracts of employment which were within the reach of its commerce power. Thus, Congress proceeded to choose language which was much better suited to accomplishing its precise objective.

2. Congress chose to insert the jurisdictional language "engaged in interstate commerce" into the § 1 exclusionary clause because it expressed Congress's full commerce power over contracts of employment, and this was the power Congress wanted excluded from the commerce power being exercised under the FAA.

In *Ill. Cent. R. R. Co. v. Behrens*, 233 U.S. 473 (1914), the Court observed that, while the particular language of the FELA did no not go so far, where a railroad employee's interstate and intrastate employment activities were as a practical matter inseparable and indivisible, the Congress had authority under the commerce

power to regulate the railroad's liability to the employee for personal injuries sustained while actually performing purely intrastate activities. In support of this proposition, the Court cited the decision in *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612 (1911). There, as previously noted, the Court had held that under the language of "An Act to Promote the Safety of Employees . . . ," which extended to "*employees, engaged in* the transportation of persons or property by railroad in [interstate commerce]," the Congress had exercised its constitutional authority to regulate the intrastate activities of employees that were indivisible from the employees' interstate activities. Moreover, subsequent to the *Behrens* case, the Court adopted an expanded interpretation of the similar though somewhat inexact language of the FELA so as to apply it to a cook who at the time of his injuries was rendering services exclusively intrastate. *Philadelphia, B. & W. R. Co. v. Smith*, 250 U.S. 101 (1919). This expanded application remained in effect until 1931 when the Court returned to the narrower standard applied in *Behrens* and *Shanks v. Del., Lackawanna, W. R.R. Co.*, 239 U.S. 556 (1916). See *McLeod v. Threlkeld*, 319 U.S. 491, 498 (1943) (Murphy, J., dissenting), discussing the 1931 retreat from the *Smith* standard.

In 1925, therefore, the use of the words "engaged in interstate commerce" would have been understood by Congress as reaching to the full extent of the commerce power. Moreover, the words "engaged in" would have been the words that Congress would have considered appropriate in framing a Commerce Clause provision directed solely at employees. At the time of the enactment of the FAA, commerce was defined essentially as follows:

> "Commerce consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities."

Craft v. Campbell Soup Co., 177 F.3d at 1086, quoting *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918). Contracts of employment would not involve a purchase, sale, or exchange of commodities; as in the case of transporting persons or property, participation by an employee in purchase, sale, or exchange activities would occur only as a result of an employee's contract with an employer to "engage in" such activities on the employer's behalf. Thus, in the "contracts of employment" context, the use of the words "engaged in interstate commerce" covered the full spectrum of employee activities within the reach of the 1925 commerce power. Consequently, by using those jurisdictional words in the FAA § 1 exclusion, Congress had expressed the full power available to it under the Commerce Clause with respect to contracts of employment.

3. Congress chose to insert the specific references to "seamen" and "railroad employees" and the specific classification terminology "any *other* class" into the FAA § 1 exclusionary language because it wanted to illuminate the breadth of the exclusion and to make plain that it was not excluding particular categories or classes of workers, which would have invited piecemeal exclusionary determinations, but rather that it was excluding contracts of employment in their entirety, thereby rendering any sort of piecemeal exclusionary assessments inapposite. If in § 1 Congress had simply used the phrase "of any class of employees engaged in interstate commerce" after the words "contracts of employment," that phrase would most definitely have invited, and indeed demanded, case by case determinations as to who was and who was not excluded; given the lack of comprehensiveness in the

exclusionary formulation, it would have been virtually impossible for that phrase to be construed from the outset as excluding all contracts of employment. Ultimately, after several applications of the language (and even seamen and railroad employees would have had to test the provision since they would not have been specifically excluded), the courts might have concluded that all contracts of employment were excluded; but just as easily, as evidenced by the current state of affairs, the courts might have concluded that only workers "engaged in interstate commerce," as that phrase was understood in 1925, were excluded.

It was in an effort to avoid this problem that Congress used the more comprehensive, all-inclusive language found in the current exclusionary clause. Congress identified the two classes of workers which it extensively regulated, and indeed essentially the only two classes it regulated at all, "seamen" and "railroad employees," and inserted them into the FAA § 1 exclusion to indicate that the contracts of employment of these two extensively regulated classes – and hence the two classes most clearly within the reach of Congressional power – would not be within the scope of the commerce power exercised under the FAA. Congress then inserted the words "any *other* class of workers" in § 1 to indicate that the contracts of employment of any other classes of workers that might be within the reach of the Congressional commerce power would also not come within the scope of the power exercised under the FAA. It is evident that Congress used the specific class references and the all encompassing "any other class" in order to leave no doubt as to its objective of excluding all contracts of employment from the reach of the FAA.

Given this backdrop, it is clear that in the instant statutory context the ejusdem generis maxim cannot be invoked to narrow the scope of the § 1 exclusion. To begin with, the maxim only applies when the specific words in a list are needed to clarify the general category which follows them in order to determine whether certain unspecified items fall within the general category. This use of the maxim establishes that the specific words have a purpose and are not mere surplusage, and also serves to give specific contours for the application of the general category to the unspecified items. See 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 47:17 (6th ed. 2000). But where, as here, the specific legislative intent is not to delimit a general category to be applied on a case by case basis, but rather is to use the specific words to illuminate the breadth of the general category in order to effectuate a complete exclusion of the object of the list, in this case "contracts of employment," then the specific words cannot be deemed surplusage and the ejusdem generis maxim does not apply. That this was the legislative intent in the present statutory context is confirmed by the fact that the rule of ejusdem generis cannot be correctly and intelligibly applied to the provisions of § 1 of the FAA.

The court that first applied the rule of ejusdem generis to the interpretation of § 1 of the FAA did so precisely because it failed to recognize and address the threshold statutory construction issue presented by the language of the § 1 exclusion, namely whether or not all contracts of employment are excluded from the reach of the FAA. *Tenney Eng'g, Inc. v. United Elec. & Mach. Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953). Notably, the *Tenney* decision has become the foundation upon which virtually all of the other Courts of Appeals decisions adopting a

narrow construction of § 1 have been built. Since the *Tenney* analysis of the § 1 exclusion will not withstand scrutiny, all of the appellate decisions which rely on *Tenney* are likewise fundamentally flawed.

The *Tenney* court never directly examined the question of whether § 1 was intended to exclude all contracts of employment. It bypassed that question, and simply assumed that the exclusion called for case by case determinations of which classes were excluded and which were not. In *Tenney*, a stay pending arbitration was sought by a union representing employees "engaged in the manufacture of goods for sale in interstate commerce." *Tenney*, 207 F.2d at 451. From the point of view of the *Tenney* court, therefore, the issue was "whether the . . . employees . . . are to be regarded as a 'class of workers engaged in foreign or interstate commerce' within the meaning of the exclusionary clause." *Id.* at 452. To resolve this issue, the court determined that the question it had to answer was whether the phrase "workers engaged in foreign or interstate commerce" as used in § 1 of the FAA should be confined to the 1925 contours of the commerce power or whether it should be extended to the expanded contours of the 1953 commerce power. *Id.*

To assist in answering the question it posed, the *Tenney* court invoked the rule of ejusdem generis and then proceeded to misapply it. The court reasoned that because "seamen" and "railroad employees" are engaged directly in the movement of interstate and foreign commerce as "transportation workers" the general phrase "engaged in foreign or interstate commerce" as applied to other classes of workers was intended to be limited solely to other transportation workers similarly engaged in interstate commerce. However, in focusing specifically on the "transportation" characteristic of seamen and railroad

employees as a means of qualifying the general term "engaged in foreign or interstate commerce," the court failed to abide by a critical tenet of the ejusdem generis maxim: namely, that the characteristic selected from the specific words must bear some logical policy relationship to the object of the statutory provision in which the list of words is contained.

> "In most instances there is a wide range of ways in which classes could be defined, any of which would embrace all of the members in an enumeration. Germaneness to the subject and purpose of the statute, viewed in terms of legislative intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given."

2A Norman J. Singer, Statutes & Statutory Construction § 47:18 at 289. Here, the § 1 exclusion is designed to preclude use of the FAA to enforce arbitration clauses in "contracts of employment." But there is no logical or intelligible reason why that preclusion should be understood as having been limited to transportation workers; in other words, the fact that seamen and railroad employees happen to be engaged in commerce as "transportation workers" is without significance in relation to the object of the statute. Although the *Tenney* court points to the fact that in 1925 seamen and railroad employees were already subject to certain statutory arbitration provisions, it is evident that the existence of such provisions was not a function of the status of seamen and railroad employees as transportation workers. Moreover, the applicability of specialized arbitration provisions to certain groups of workers is plainly not itself a characteristic of being a worker engaged in interstate commerce. In

sum, consideration of the reference to "seamen" and "railroad employees" in the context of the § 1 exclusion fails to reveal any common characteristic which would rationally justify narrowing the general phrase "engaged in interstate commerce." "Where a general term appears . . . with specific terms not suggesting a class, the rule of ejusdem generis does not apply." 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 47:20 at 293. It follows that *Tenney* erred when it applied the ejusdem generis maxim to the § 1 exclusion.

Despite the fact that *Tenney* misapplied the ejusdem generis doctrine and that it never squarely addressed the issue of total exclusion of contracts of employment, every Circuit Court of Appeals that has interpreted the scope of § 1 of the FAA narrowly has relied on *Tenney*, either directly or indirectly, for the proposition that § 1 was not intended to exclude all contracts of employment.[4] Not one of these courts has undertaken an independent analysis of the issue of exclusion which goes beyond the basic inquiry pursued in *Tenney*, and not one of them has ever subjected the *Tenney* court's application of the ejusdem generis maxim to any sort of rigorous scrutiny. It follows that if the *Tenney* analysis of the exclusion issue is fundamentally unsound, then these decisions are fundamentally unsound as well.

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[4] See Brief for Petitioner at 11 n.4, listing one such decision from each of the Circuit Courts adopting a narrow interpretation of the § 1 exclusion.

C. The 1947 Reenactment And Codification Of The FAA Confirmed And Reinforced The Intent Of The 1925 Congress To Exclude All Contracts Of Employment From The Reach Of The FAA.

It is argued that because the FAA was reenacted and codified in 1947, see Act of July 30, 1947, Ch. 392, § 2, 61 Stat. 669, 670-674, the FAA § 1 exclusion should be interpreted in accordance with the 1947 Congressional intent underlying the reenacted statute. First, as one *amicus curiae* advancing this argument candidly concedes, since the 1947 reenactment did not materially change the text of the FAA, " . . . it would ordinarily be inappropriate to read any significance into Congress's repeal and reenactment [since] to do so would constitute a 'drag upon codification,' HENRY H. HART, J. & ALBERT M. LACKS, THE LEGAL PROCESS 1403 (tent. ed. 1958). . . . " Brief of Credit Suisse First Boston As Amicus Curiae in Support of Petitioner at 12.

Second, since there was no textual change in the FAA, there is no basis for inferring a changed intent on the part of Congress. The argument that is made focuses on the fact that the revolution in "commerce power" jurisprudence took place between 1925 and 1947, and that as a result of that revolution the courts proceeded to draw a distinction between the words "engaged in commerce" and the words "affecting commerce," conferring a narrow reading on the former and a broad one on the latter. But as has been repeatedly pointed out, this would not have had and did not have any effect on the words "engaged in interstate commerce" as used in § 1 of the FAA. That is because those words were set out in an exclusionary, not inclusionary, clause, and were intended to express Congress's full commerce power over contracts of employment in order to exclude that power completely

from the power exercised under the FAA. In other words, any limitations placed by the courts on the words "engaged in commerce" in an inclusionary context would not have affected the broad reading of those words in an exclusionary context. Thus, in 1947 Congress would not have had any reason to believe that the "engaged in interstate commerce" language in § 1 would not be given the broad exclusionary effect intended by the 1925 Congress.

Moreover, the cases which had interpreted the § 1 exclusion prior to 1947 had either held or implied that all contracts of employment were outside the reach of § 2 of the FAA. In *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944), the Sixth Circuit specifically held that the § 1 exclusion applied to the entire FAA and not just to § 2, and that § 1 covered and therefore excluded all contracts of employment. In *Watkins v. Hudson Coal Co.*, 51 F.2d 311 (3rd Cir. 1945) and *Donohue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1941), the Third Circuit, following a slightly different path, concluded that the § 1 exclusion applied only to § 1 and to the reach of § 2 but did not apply to § 3; the court held that under § 3 it could stay proceedings pending arbitration of claims arising under the FLSA, even though the claims were excluded from the reach of § 2 by virtue of the § 1 exclusion. Thus, the court necessarily determined that by reason of § 1, § 2 could not be used as the basis for enforcing arbitration clauses in contracts of employment. Shortly thereafter, the Third Circuit concluded that the § 1 exclusion did indeed apply to the entire FAA and specifically held that all contracts of employment were excluded from the FAA. *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Pa. Greyhound Lines*, 192 F.2d 310 (3rd Cir. 1951). This change of position was in fact triggered by the

catchline placed above § 1 at the time the FAA was reenacted and codified in 1947. Thus, the case law specifically reinforced and implemented the intent of the 1925 Congress to exclude all contracts of employment from the reach of the FAA. It is therefore clear that the arguments against exclusion advanced on the basis of the 1947 codification are entirely without force.

D. The Legislative History Supports The Conclusion That The 1925 Congress Intended To Withdraw All Of Its Commerce Power Over Contracts Of Employment From The Scope Of The Commerce Power Exercised Under The FAA.

The legislative history is thoroughly examined in the Ninth Circuit's decision in *Craft v. Campbell Soup Co.*, 177 F.3d at 1089-1090. See also Mathew W. Finkin, *"Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996). That history shows that the § 1 exclusion was inserted into the bill that became the FAA in order to allay concerns about the application of the FAA to workers and to make it absolutely plain that the commerce power being exercised under the FAA was not intended to include any of the commerce power that Congress had over workers and their contracts of employment. This clear and unmistakable history supports the conclusion that all contracts of employment were intended to be excluded from the FAA.

II. THE POLICY UNDERLYING THE FAA § 1 EXCLUSION IS ONE OF PRESERVING TO BOTH THE STATES AND THE FEDERAL GOVERNMENT THE FLEXIBILITY TO DETERMINE WHEN ARBITRATION IS AN APPROPRIATE REMEDY FOR THE IMPLEMENTATION OF WORKERS' RIGHTS AND PROTECTIONS.

A. The Policy Of Preserving Flexibility To Both The States And The Federal Government In The Context Of Contracts Of Employment Is Distinct From And Not Displaced By The Policy Favoring Arbitration In Other Areas.

The view that all contracts of employment should be excluded from the reach of the FAA is neither hostile nor inimical to the national policy favoring arbitration. The view simply expresses a different policy which finds its source in § 1 of the FAA instead of § 2. The § 1 policy seeks to accord both the states and the federal government flexibility in determining when and to what extent a judicial, administrative, or arbitral procedure, or a combination thereof, is best suited to the effectuation of workers' rights and protections.

At the time of the enactment of the FAA, the Congress had already statutorily implemented special arbitral procedures for seamen and railroad employees. See Shipping Commissioners Act of 1872, Ch. 322, 17 Stat. 262 and Transportation Act of 1920, Ch. 91, 41 Stat. 469. Thus, Congress was already aware of the need to specially tailor remedies for workers in the employment context. This awareness was consistent with its intent, as expressed in the FAA, not to subject workers and contracts of employment to a single, uniform arbitral scheme applicable to every conceivable employment relationship in every conceivable regulatory context. In other words, the Congress reserved to a future date the determination

of when, where and to what extent it would impose arbitral remedies on particular groups of workers.

The Congress was also necessarily aware of the traditional and paramount role of the states in providing protections to workers. Aware of its own need for flexibility in the limited areas where it regulated employment, the 1925 Congress most certainly had no intention of divesting the states of their authority to exercise flexibility in their areas of traditional employment regulation. Thus, Congress carved out contracts of employment from the reach of the FAA in order to preserve flexibility for both the states and for itself.

The policy of flexibility embodied in § 2 with respect to contracts of employment is not inferior or subordinate to the policy favoring arbitration embodied in § 1 with respect to other contracts. Each policy operates in its own independent sphere and neither policy can dictate how the other policy is to be applied. Consequently, the policy favoring arbitration contained in § 2 cannot be invoked to govern or control the effect to be given the policy of flexibility contained in § 1. It follows that the scope of the § 1 exclusion must be determined independently of the national policy favoring arbitration.

B. Implementation Of The Policy Of Flexibility Embodied in § 1 Of The FAA Is Essential To Preserving The Ability Of California To Effectively Protect And Enforce The Rights Of California Workers.

The value of preserving to the states the flexibility to determine when arbitration or some other administrative or judicial procedure is best suited to effectively vindicating the rights of workers is well illustrated by the nuts

and bolts operation of the administrative structure established under the DLSE for the processing and adjudication of wage claims.

The procedure is governed by California Labor Code §§ 98-98.5. Under the procedure, any employee who believes that wages are due in any amount may file a claim with the DLSE. There are nineteen (19) district offices throughout the state set up to accept such claims. Once the claim is assigned to a deputy, he or she takes an active role in seeking to resolve the dispute. If the dispute is not resolved informally, the matter is assigned to a hearing which is held within approximately 120 days from the date the claim was filed. The hearing is informal and is conducted by a hearing officer employed by the DLSE. A decision, including any award, is issued within 15 days of the conclusion of the hearing. The parties have a right to appeal to the state courts for a trial de novo; the appeal must be filed within 15 days of the service of the decision. If the award is against the employer, and an appeal is taken, the DLSE will assist the employee in enforcing the award. If an employer appeals an adverse decision, and the employee is unable to afford counsel, the DLSE will represent the employee without charge in the trial de novo. The DLSE will also assist with the enforcement of any subsequent judgment.

As is readily apparent, the entire process is a proactive one in which no claim, no matter how small, is allowed to be derailed or fall by the wayside. At every step, it is the DLSE that takes the initiative for moving the process along. The DLSE is there to insure that rights are not lost through inaction, inattention, or interference, and that wages justly due are paid. The entire administrative

staff, consisting of deputies, senior officers, and attorneys, contributes to assuring that regardless of complexity, the system will function effectively in vindicating the compensation rights of California workers. The system insures that the exercise of those rights will not be chilled. As a practical matter, the bulk of the claims are resolved at various stages throughout the process and very few proceed all the way to judgment.

In its recent decision in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), this Court recognized the importance of the rights conferred by the DLSE administrative procedure and held that, in denying union members access to that procedure on the sole ground that they were covered by a collective bargaining agreement containing an arbitration clause, the DLSE had violated the union members' rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. California law also recognizes the importance of the DLSE administrative procedure and guarantees access to it by providing that an employee cannot enter into a binding arbitration agreement that waives the employee's right to resort to an administrative or judicial forum for the enforcement of a claim for wages. California Labor Code § 229.

In the last several years, DLSE has witnessed the ever expanding use of pre-dispute arbitration agreements by employers as a means of defeating the jurisdiction of the DLSE to process and adjudicate wage claims. Enforcement of these agreements is repeatedly sought in the courts on the basis that the FAA covers these agreements and preempts Labor Code § 229. If this Court holds that the FAA applies to the states, the proliferation of arbitration agreements will accelerate and the right of access to the DLSE administrative procedure will have become a dead letter. The decision to substitute an arbitral forum

for the robust and proactive DLSE administrative process will have been made not by a legislative body but unilaterally by an employer pursuing its own self-interest. If the FAA applies to the states, inevitably these decisions will be made by employers and not the state legislature in every area where the employer-employee relationship is subject to some form of administrative regulation, including such areas as workers' compensation and unemployment compensation. The 1925 Congress that enacted the FAA cannot be understood to have intended such a dramatic divestiture of state authority over workers' protections and its unconditional turnover to the unfettered discretion of private entities. Absent evidence of a clear mandate from the Congress to do so, which is lacking, this Court should not interpret the FAA to effectuate such a drastic shift in the balance of power between public and private authority in the area of enforcement of workers' protections and rights.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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